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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR   | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|------------------------|---------------------|------------------|
| 09/851,456      | 05/08/2001  | Stephen Paul Zimmerman | 8074M               | 3630             |

27752 7590 04/30/2004

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CINCINNATI, OH 45224

EXAMINER

BECKER, DREW E

| ART UNIT | PAPER NUMBER |
|----------|--------------|
|----------|--------------|

1761

DATE MAILED: 04/30/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

|                              |                                      |   |  |
|------------------------------|--------------------------------------|---|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>09/851,456 | <b>Applicant(s)</b><br>ZIMMERMAN ET AL. |  |
|                              | <b>Examiner</b><br>Drew E Becker     | <b>Art Unit</b><br>1761                 |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 26 January 2004.
- 2a) ☒ This action is **FINAL**.      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-13, 15-18, 22 and 23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13, 15-18, 22 and 23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Information Disclosure Statement***

1. The information disclosure statement filed October 1, 2001 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because the three "Sample" references do not include dates. Simply, providing the dates on which these samples were obtained would meet this requirement.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claim 22 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 22 refers to an "engagement span". However, the specification does not describe what an engagement span is, or how it is calculated. Although an "engagement span" is mentioned on page 9, line 22 of the specification, it is not clear how it was calculated. Page 9 merely recites "The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d." without disclosing how one of these would be chosen, or when.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claim 22 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
6. Claim 22 recites an "engagement span". It is not clear what an "engagement span" is, or how it is calculated.

***Claim Rejections - 35 USC § 102***

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

8. Claims 1-4, 9, 12, 16-17, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Hreschak [Des. 212,070].

Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the

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axis, restriction of movement to the sides and rear, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end which is less than 75% of the open end width, a vertical taper of less than 45°, and a varying radius of curvature along its length (Figures 1-4). The recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Regardless, nearly any snack product, including Hreschak, would be capable of being stacked in some manner, for instance in a pile.

9. Claims 1-7, 9, 11-13, 15-18, and 22-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Smietana [Pat. No. 4,915,964].

Smietana teaches a stackable snack piece comprising a body curved about a first axis, the curvature forming a dip containment region which restricts the dip in at least two directions, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, the axis not being parallel to a side, a vertical span, sidewalls, a isosceles triangular shape, a vertical taper of 0-45°, the restricted end being less than 75% the width of the open end, a segment of a right cone, an engagement span less than 90% of the vertical span (Figure 21), a nested arrangement (Figure 7), a varying

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radius of curvature of 0.1-38.1 mm (column 6, line 70), and a width of approximately 75 mm (column 6, line 70).

10. Claims 1-4, 9, 12, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Morales [Des. 383,589].

Morales teaches a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a vertical taper between 0 and 45°, and an engagement span less than 90% the vertical span (Figure 1).

11. Claims 1-4, 9, 12, and 22 are rejected under 35 U.S.C. 102(e) as being anticipated by Tirillo [Pat. No. 5,997,921].

Tirillo teaches a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a vertical taper between 0 and 45°, and an engagement span less than 90% the vertical span (Figure 1).

### ***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak.

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Hreschak teaches the above mentioned components. Hreschak does not mention a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-75mm. It would have been obvious to one of ordinary skill in the art to use these sizes in the snack product of Hreschak since snack chips, such as Doritos, Pringles, and Fritos; were commonly made in these sizes, since Hreschak simply does not mention a particular size, and since consumers preferred snack foods of this size as the snack foods fit into their hands more easily.

14. Claims 5-7 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Blish [Des. 166,524].

Hreschak teaches the above mentioned components. Hreschak does not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of Hreschak since both are directed to scoop shaped foods, since Hreschak already had a generally triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

15. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Ipema [Des. 300,199].

Hreschak teaches the above mentioned components. Hreschak does not teach a segment of a right cone. Ipema teaches a scoop in the shape of a segment of a right cone (Figures 1-4). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Ipema into the product of Hreschak since both are directed to

scooping products, since Hreschak already included sidewalls and a curved scoop region (Figures 1-4), and since scoops commonly had the shape of a segment of a right cone, as shown by Ipema (Figures 1-4).

16. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Bierschenk et al.

Hreschak teaches the above mentioned components. Hreschak does not teach an equilateral triangle shape. Bierschenk et al teach a snack piece with an equilateral triangle shape (Figure 1). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Bierschenk et al into the snack product of Hreschak since both are directed to snack foods, since Hreschak already had a generally triangular shape (Figure 1), and since an equilateral triangle shape was commonly used for snack food products as shown by Bierschenk et al (Figure 1).

### ***Response to Arguments***

17. Applicant's arguments filed January 26, 2004 have been fully considered but they are not persuasive.

Applicants argue that "engagement span" was adequately described. However, the specification does not describe what an engagement span is, or how it is calculated. Although an "engagement span" is mentioned on page 9, line 22 of the specification, it is not clear how it was calculated. Page 9 merely recites "The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d." without disclosing how one of these would be chosen,



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or how it would be calculated. Although a value has been given to the engagement span, it is not clear what the engagement span<sup>is</sup>, or how it is calculated.

Applicants argue that Hreschak was not “stackable”. However, nearly any snack product, including Hreschak, would be capable of being stacked in some manner. For instance, the snack products of Hreschak could have easily been stacked in a pile. Furthermore, claim 1 recites “A stackable, uniform snack piece” which merely means that the **singular** snack-piece must be **capable** of being stacked in some fashion, for instance a pile.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., nesting of the snack piece in claim 1) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). “Nesting” of the snack-piece is addressed by Smietana.

Applicant argues that Hreschak does not teach an engagement span. However, since it is not clear what an “engagment span” is, the examiner has given the term “engagement span” its broadest, reasonable meaning. For instance, Hreschak does indeed teach an “engagement span”, or width at its narrow end, which is no more than 90% of the vertical span as seen in Figures 1-4.

Applicant argues that the examiner should submit an affidavit due to “personal knowledge”. However, the examiners statements and stance are clearly evident in the

references and are not drawn from "personal knowledge". Therefore, an affidavit is not required.

Applicant argues that Smietana restricts dip movement in only one direction. However, the cone shape of Smietana clearly restricts movement in many directions, for instance towards the closed end, downward, to either side, and upward, to name but a few.

Applicant argues that Smietana does not teach an engagement span. However, since it is not clear what an "engagement span" is, the examiner has given the term "engagement span" its broadest, reasonable meaning. For instance, Smietana does indeed teach an "engagement span", or width at its narrow end, which is no more than 90% of the vertical span as seen in Figure 1.

In response to applicant's argument that Morales fails to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., stacked snack pieces) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Claim 1 recites "A stackable, uniform snack piece" which merely means that the **singular** snack-piece must only be **capable** of being stacked in some fashion, for instance a pile.

Applicant argues that Morales does not teach an engagement span. However, since it is not clear what an "engagement span" is, the examiner has given the term "engagement span" its broadest, reasonable meaning. For instance, Morales does

indeed teach an "engagement span", or width at its peaked end, which is no more than 90% of the vertical span as seen in Figure 1.

In response to applicant's argument that Tirillo fails to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., stacked snack pieces) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Claim 1 recites "A stackable, uniform snack piece" which merely means that the **singular** snack-piece must only be **capable** of being stacked in some fashion, for instance a pile.

Applicant argues that Tirillo does not teach an engagement span. However, since it is not clear what an "engagement span" is, the examiner has given the term "engagement span" its broadest, reasonable meaning. For instance, Tirillo does indeed teach an "engagement span", or width at its open end, which is no more than 90% of the vertical span as seen in Figure 1.

Regarding the size of Hreschak: *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a

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claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

### ***Conclusion***

18. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

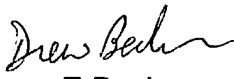
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-

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1396. The examiner can normally be reached on Mon.-Thur. 8am-5pm and every other Fri. 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Drew E Becker  
Primary Examiner  
Art Unit 1761

4-29-09